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United States of America
In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 230

EDWIN CHARLES BEAUCHAMP,
Petitioner and Appellant,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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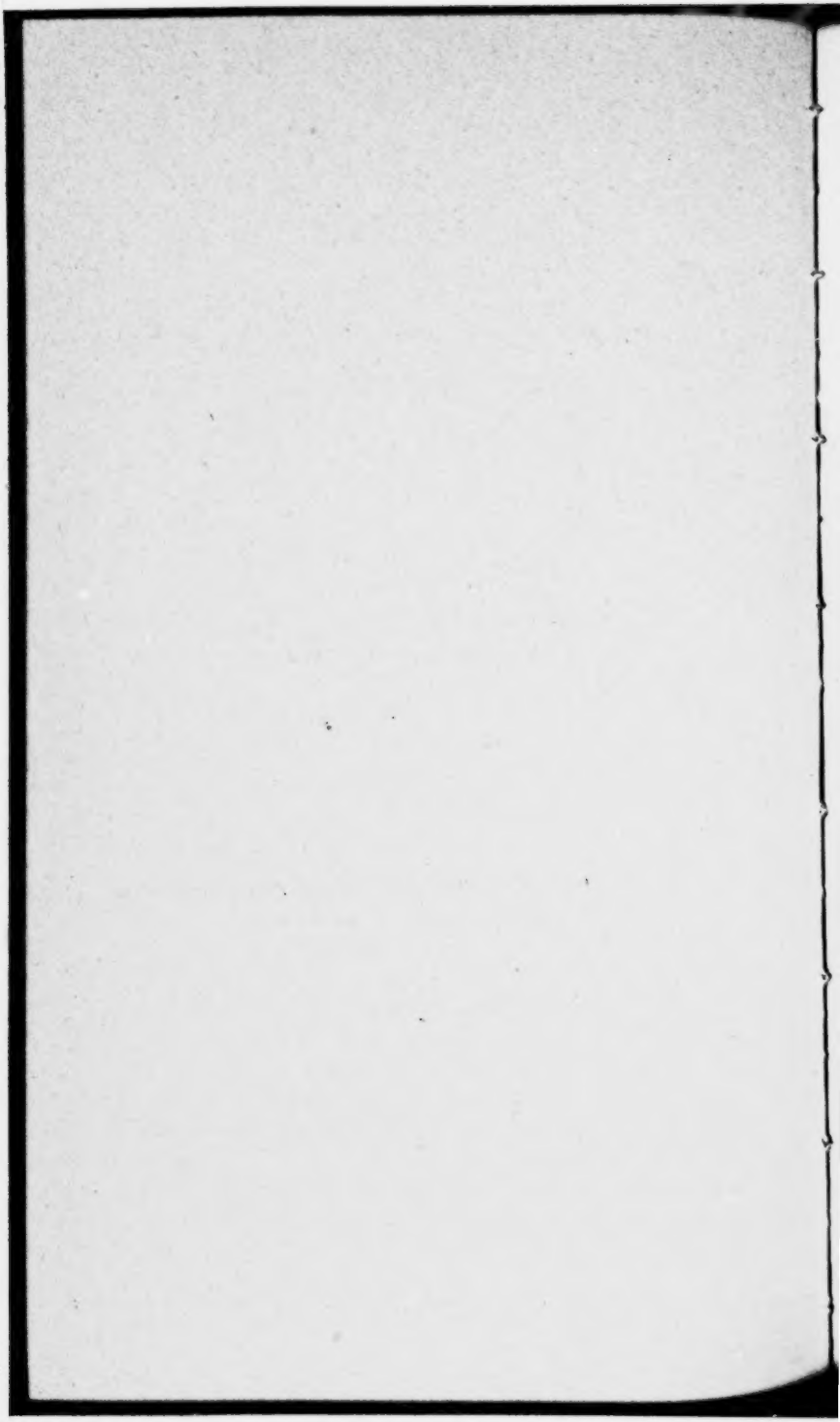

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edwin Charles Beauchamp, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

STATEMENT OF THE MATTER INVOLVED

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

A single count indictment charged Edwin Charles Beauchamp, petitioner herein with violation of Title 18, U. S. C. A. 94. Specifically, it accused Edwin Charles Beauchamp, of aiding and assisting a deserter from the United States army. It named Alexander White (Beauchamp's former employee at the Hub Auto Parts, in Pontiac, Michigan) as the deserter, and asserted that petitioner's assistance was rendered with knowledge that the said White had deserted (1-2).

Trial without jury was had (3). Thirteen witnesses, including the soldier Alexander White testified in behalf of the government. From none of them, nor from any exhibits introduced, did it appear that the soldier, Alexander White, had ever been accused, tried, or convicted by a military tribunal, of violating any provision of the Articles of War relating to the crime of desertion.

On the contrary it did appear that Alexander White had been inducted into the United States Army on July 9th, 1942 (10). In August of 1943, he returned to the vicinity of Pontiac on furlough (10, 16, 29). He stayed at the home of a friend, Bill Marotz, who was then employed by the petitioner. Before the expiration of this furlough, this petitioner saw him; knew he became ill; knew he was taken to the United States military hospital at Selfridge Field, Michigan.

The next time the petitioner saw him was in November of 1943, when White appeared in civilian clothes; sought and obtained his old job back on the claim he had received a medical discharge from the army.

In February of 1944, Alexander White was arrested by Pontiac police officers at the telephoned request of Military

Police in Detroit (105). It appears that a circular for the apprehension of stragglers or those failing to report to a United States Army camp had issued for White in September, 1943 (104).

Petitioner testified in his own behalf. He asserted good faith in his rehiring of Alexander White in November of 1943; as a soldier who had received a medical discharge from the army (91, 93, 98). He was supported by nine other witnesses, including Stanley White, brother of Alexander; as well as the soldier Alexander White, recalled as a witness by his trial counsel.

Motions made at the conclusion of the government's case (65) and again at the termination of all the testimony (130-133) sought to note the distinction between the military crimes of desertion and being A. W. O. L.

Petitioner was adjudicated guilty by the court (4) and sentenced to serve a period of twenty (20) months imprisonment; and to pay a committed fine in the amount of One Thousand ($1,000.00) Dollars (4).

THIS COURT HAS JURISDICTION

This case involves "an important question of Federal law, which has not been, but should be, settled by this Court." (Supreme Court rule 38 Par. 5 (b).) This court has never decided the contention first passed upon by the Circuit Court of Appeals for the Sixth Circuit. This relates to an interpretation of that portion of Title 18 U. S. C. A. 94, following the semicolon. That portion of the statute relates to criminal punishment of a civilian who knowingly aids and assists a soldier who had deserted from the United States military services.

By its ruling the Circuit Court of Appeals sustained the conduct of the District Court in holding adversely to petitioner's urging that until there had been an adjudication by the proper military tribunal, that the soldier involved was guilty of violating the Articles of War relating to desertion, the District Court was without jurisdiction to submit to the jury the issue as to a civilian's guilt.

The result of such construction requires a member of the military services to be adjudicated guilty of the crime of desertion by a civilian tribunal without anticipatory punishment. It may occasion any civilian seeking to aid a returned soldier to commit a crime of which he was unaware. It conceivably could be applied to any member of the family of a member of the armed forces who without intent, urged and condoned his failure to return to camp on time. Likewise, does it possibly preclude the long recognized distinction between the crimes of Absent Without Leave as contrasted to desertion.

The case of *Kurtz v. Moffitt*, 115 U. S. 487, though not determining the exact issue presented to the Circuit Court of Appeals for the Sixth Circuit, does disclose a line of reasoning properly applicable to the issue presented to the United States Circuit Court of Appeals for the Sixth Circuit.

No final determination of the exact question presented has been made by any other United States Circuit Court of Appeals, save in the opinion, review of which is hereby sought.

Application of the Circuit Court of Appeals for the Sixth Circuit's determination of the question presented would result in such a departure from the accepted and usual course of judicial proceedings as to prompt this Court's review thereof. It would allow a jury in the United States District Courts to determine the existence of two crimes;

the crime of the soldier (desertion), then the crime of the civilian. It would permit (as in the instant case) punishment of the civilian for a crime and so far as this record is concerned, no punishment for the soldier. It would permit a jury to determine the crime of desertion in a manner contrary to all fundamental rules of law.

THE QUESTION PRESENTED

Did the Circuit Court of Appeals for the Sixth Judicial Circuit, err in overruling petitioner's contention that until there had been an adjudication by the proper military tribunal, that the soldier involved was guilty of violating the Articles of War relating to desertion, the District Court was without jurisdiction to try the issue presented by the indictment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

First, that portion of the act herein discussed has not heretofore been interpreted by this Honorable Court.

Second, the construction afforded by the opinion of the Circuit Court of Appeals for the Sixth Circuit, results in hazardous situations to all who may seek to aid a returning member of our military forces.

Third, the construction afforded that section of the statute is obviously contrary to Mr. Justice Gray's opinion in the cause of *Kurtz v. Moffitt,* 115 U. S. 487, in that, it is clear that the intent was, first, that a soldier had been found guilty by the proper military tribunal of being a deserter

and secondly, that the prosecution of a civilian would then be based upon his, the civilian's knowledge thereof.

Respectfully submitted,

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Attorney for Petitioner.

DONALD B. FREDERICK,
Of Counsel.

United States of America

In the

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OCTOBER TERM, 1946

No.....

EDWIN CHARLES BEAUCHAMP,
Petitioner and Appellant,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit has not been reported. The opinion is printed in full in the record (146).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347). The Circuit Court of Appeals has, in this case, decided an important question of Federal law which has not been, but should be, settled by this Court. The Circuit Court of Appeals has, in this case, also decided a question of Federal law in a way probably in conflict with an applicable decision of this Court. The decision of the Circuit Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to require (in the interest of justice) an exercise of this Court's power of supervision. (Supreme Court Rule 38 (V) (b).)

Judgment was entered in this case by the United States Circuit Court of Appeals on April 1, 1946 (145).

STATEMENT OF THE CASE

There are no controverted issues of fact. The sole question relates to the necessity of the Government presenting in support of their proof against a civilian defendant, charged with knowingly aiding and assisting a soldier who had deserted from the military services of the United States, some record or evidence that there had been a final adjudication of guilt for the crime of desertion by a proper military tribunal.

ERRORS RELIED UPON

The Circuit Court of Appeals erred in overruling petitioner's contention that until there had been an adjudication by the proper military tribunal that the soldier involved was guilty of violating the Articles of War relating to desertion, the District Court was without jurisdiction to try the issue presented by the indictment.

ARGUMENT

Among the immutable principles of our fundamental law does it appear that jurisdiction over crimes against the United States is divided into two broad classifications: those pertaining to the civilian population and those involving members of our armed forces. With equal unanimity is it recognized that no overlapping authority exists as to procedure, trial, or punishment for these separate types of crime.

Ex parte Quirin, 317 U. S. 1.
In re: Yamashuto, United States Supreme Court Numbers 61 and 672, October Term 1945.
Duncan v. Kahanamoku, United States Supreme Court Numbers 14 and 15, October Term 1945.
Kurtz v. Moffitt, 115 U. S. 487.

The Statute under which this civilian petitioner stands convicted reads as follows:

> "Enticing Desertion from Army or Navy. Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than $2,000." (Criminal Code, Section 42, Title 18 U. S. C. A., Section 94.)

The conviction of this petitioner was had under that portion thereof following the semicolon, viz., that he aided and assisted Alexander White, a soldier in the military service in the United States, who had deserted from said service; as this petitioner well knew.

Upon one previous occasion did this Court have cause to take cognizance of this act.

Kurtz v. Moffitt (supra).

The situation there presented did not necessitate final determination of the exact question here raised. It there appeared that police officers of the City of San Francisco arrested Kurtz, a soldier of the United States Army, as a deserter; held him in custody for the purpose of delivery to the United States military authorities—to be tried according to the laws of the United States. A Petition for Writ of Habeas Corpus was filed by Kurtz in the local court. It was removed to the United States Court and by it remanded. Upon final hearing the California Court denied the Petition and returned Kurtz to custody.

After first affirming the Order remanding the cause to the State Court, Mr. Justice Gray, delivering the Opinion of this Court, logically reversed the State Court's final determination thereof, on the basis that a civilian does not have any right to arrest and detain a member of the United States military service, except upon express authority of the proper military officers.

The distinction between civilian and military offenses comes to us as part of our heritage from the English Common Law. It was incorporated as a part of the Bill of Rights of the American Constitution. Distinctions as to procedure, trial and punishment were equally recognized by our progenitors in their earliest legislative enactments. Such was the supporting argument of Mr. Justice Gray in the Moffitt case (pp. 498-504).

At page 502 did he have occasion to note that section of the Penal Code with which we are here concerned by stating, (it)

> "• • • merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion of a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself, and no tendency to show that he may be arrested by a private citizen without authority from a military officer. Indeed, the last clause above quoted has rather the opposite tendency."

As applied to the situation with which we are confronted in the instant case, do we cite the foregoing authority for the proposition that until the Government has established that Alexander White, the soldier named therein, had been adjudicated a deserter from the United States Army, by the proper military tribunal (a Court Martial), according to the provisions of the Articles of War applicable thereto; this civilian defendant could not be found guilty of that portion of the Statute here in question relating to the crime of aiding and assisting a soldier WHO HAD DESERTED.

Our position is sustained by the recognition of certain fundamental precepts: (a) civilians are not triable in the military courts; (b) desertion from the armed forces of the United States is comparable to treason; (c) our enemies may reside within our boundaries as well as in foreign lands; and upon occasion they may claim citizenship of this Republic; (d) such evil-intended persons might effectively aid our enemies, destroy morale of members of our military services again and again without fear of prosecution or punishment; (e) with the full knowledge that no federal criminal law might effectively reach them; (f) since there are no federal offenses save those enacted by Congress.

So did Mr. Justice Gray refer to such persons as "* * * accessories to the crime of desertion by a soldier * * *."

To make certain that these individuals did not go unpunished, should it appear that the soldier had actually deserted and been found guilty thereof by the proper military authorities, was this Statute enacted, and as Mr. Justice Gray stated, (it) "* * * merely provides for the punishment of civilians, * * *."

THE ERROR IN THE OPINION BELOW

The Sixth Circuit Court of Appeals asserts that though they recognize the distinction between civilian and military crimes; the test of guilt or innocence under the statute here involved is that applicable to the ascertainment of guilt under any case involving a federal penal statute; hence, whether the soldier was a deserter from the military services or not, was a fact question to be decided by the jury.

The fallacy of this reasoning is that it fails to meet the syllogistic test.

At the outset do they cite *Kurtz v. Moffitt (supra)* as authority for the sole proposition that exclusive jurisdiction to ascertain and punish members of the military services of the United States for violations of the Articles of War as being vested solely in the military courts.

Truisms then set forth respecting the common law rule pertaining to accessories before the fact as contrasted with recognized federal law; the existence of no common law offenses against the United States; and the want of necessity, under a federal criminal statute to first try the principal before trying an aider and abetter; but result in the inevitably erroneous conclusions that:

The guilt of Alexander White, the soldier in this case, of violating one of the Articles of War (viz., desertion) need not be found by a military court martial.

The knowledge requisite to an ascertainment of guilt of the civilian as provided for in this statute, would permit infliction of punishment upon him for a crime of which he was unaware.

It would require a jury to first decide the commission of the military crime of desertion before determining the existence of the civilian crime of aiding and assisting a soldier who had deserted from the military services.

CONCLUSION

It is respectfully submitted that, for the reasons hereinabove stated, petitioner's petition for writ of certiorari should be allowed. It appears that the specific question presented has not heretofore been passed upon by this Honorable Court. The decision of the Circuit Court of Appeals for the Sixth Circuit, adverse to petitioner's contention relative to the construction of that portion of the statute discussed, is the only ruling upon this specific question handed down by any Circuit Court of Appeals. The decision is inimical to all who may assist returning soldiers. It determines the question presented in a manner contrary to the conclusion obviously intended by the early decision of this court which has heretofore discussed the statute. Likewise does it appear that its construction of the statute is tantamount to judicial legislation.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 230

EDWIN CHARLES BEAUCHAMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 145–151) is reported at 154 F. 2d 413.

JURISDICTION

The judgment of the circuit court of appeals was entered April 1, 1946 (R. 145), and a petition for rehearing was overruled May 27, 1946 (R. 165). The petition for a writ of certiorari was filed June 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45

(a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether petitioner could be prosecuted under Section 42 of the Criminal Code for aiding a deserter from the Army before the soldier had been convicted of desertion by a court-martial.

STATUTE INVOLVED

Section 42 of the Criminal Code (18 U. S. C. 94) provides in pertinent part that:

> * * * whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than $2,000.

STATEMENT

An indictment containing a single count was returned against petitioner in the United States District Court for the Eastern District of Michigan on June 5, 1944, charging that he aided and assisted one Alexander White, a soldier in the military service of the United States who had deserted from the service, in continuing his desertion and avoiding apprehension by proper authorities (R. 1–2). Petitioner waived a trial

by jury (R. 3), and after a trial by the court was found guilty (R. 3–4) and sentenced to imprisonment for a period of 20 months and to pay a fine of $1,000 (R. 4–5). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 145).

The evidence showed that White, who was absent without leave from the Army, had been arrested by the military police in Detroit, and while going back to his camp, had once more absented himself and returned to his home (R. 12). This was in October 1943 (R. 12). White did not intend to return to the Army (R. 15, 114, 117). A few weeks later petitioner, who had employed White prior to his entering service, reemployed him in his auto parts business at Pontiac, Michigan (R. 13–14). Petitioner knew that White had been in the Army (R. 10, 90). The evidence of several witnesses showed that petitioner was fully aware that White was a deserter from the Army and was wanted by the military authorities for desertion (R. 13–14, 35, 42–43). There was evidence that petitioner had taken advantage of that circumstance to get more work out of White by threatening to turn him in to the Army if he did not improve his working habits (R. 13, 40, 43, 45, 116). Police on several occasions visited petitioner's place of business, making inquiries about White; on these visits they had informed petitioner that White was a deserter (R. 51–52, 55, 56–67). On one of these visits.

petitioner had identified White as being a person named Cassidy (R. 35, 57, 59, 60, 61), and told the police that White had not been there (R. 52, 53, 54, 55).

ARGUMENT

Petitioner contends that since desertion is a military offense, only a military tribunal could adjudicate that issue, and that until such a military adjudication had been made as to White, the district court was without jurisdiction to try petitioner for aiding him (Pet. 4–5, 9–12).

Petitioner's contention is supported neither by the terms of Section 42 of the Criminal Code for violation of which he was convicted, nor by the purpose of that section, nor by established principles of criminal law. That portion of the statute under which petitioner was indicted only requires the Government to show that (1) the defendant aided or harbored the soldier, (2) the soldier was a deserter, and (3) the defendant knew that the soldier had deserted. The record unequivocally establishes all three of these factors. There is no requirement in the statute, either express or implied, that as a condition precedent to prosecution the fact of desertion must be established by the adjudication of a proper military tribunal. To read such a condition into the statute would require civil courts to abdicate their independent functions of determining legal and factual issues for themselves, and would, moreover, introduce uncertainty into civil judicial

administration by making the enforcement of the Criminal Code contingent upon the administration of the Articles of War and the Articles for the Government of the Navy.

1. The language of Section 42 here pertinent, "whoever shall * * * assist any such soldier * * * who may have deserted from such service, knowing him to have deserted therefrom", negatives the notion that the deserter must first have been convicted of desertion by a court-martial of competent jurisdiction. The statute reads, "who may have deserted from such service," not—as petitioner seems to urge—"who may have been convicted of desertion from such service." Both as a matter of language and of congressional intent, it seems clear that the statute refers to one who has absented himself from the service without authority and without intent to return, rather than to one who has actually been convicted of desertion. The evil which Congress sought to remedy was the sheltering &c. by civilians of servicemen who had left military control and who were evading attempts to return them to such control to answer for their offenses. Construed as petitioner urges, the statute would be self-defeating: the military authorities could not possibly adjudicate the issue of desertion before the apprehension of the soldier, yet the offense under Section 42 of aiding or harboring a deserter necessarily occurs before the deserter's apprehension. The action which that section makes criminal is the very

action which, if persisted in undisturbed, would preclude the possibility of ever obtaining a military adjudication.

Indeed, as the legislative history of Section 42 shows, aiding or harboring a deserter was made an offense precisely because such acts did prevent the apprehension of persons who had deserted and who were avoiding adjudication by court-martial. The present provision, which is derived from two sections of the Revised Statutes,[1] actually originated as Section 24 of the Civil War draft act of March 3, 1863, c. 75, 12 Stat. 731, 735, at which time the language now material read,

> That every person not subject to the rules and articles of war * * * who shall harbor, conceal, or give employment to a deserter, * * * knowing him to be such * * *

That provision was designed not only to effect the purposes of the Civil War draft, but also to strike at the then prevalent "absenteeism" which had materially and dangerously reduced the effective strength of the Union Army. See, *e. g.*, Cong. Globe, 37th Cong., 3d sess., p. 1253. Both purposes would have been frustrated by a reading which would restrict "deserter" to mean one who

[1] R. S. 1553 and R. S. 5455. The basic legislation was Sec. 24 of the Act of Mar. 3, 1863, noted in the text, and the Act of July 1, 1864, c. 204, 13 Stat. 343, enacting similar substantive provisions in respect of aiding or entering deserters from the naval service.

had been duly convicted of desertion by sentence of court-martial.

An apposite analogy may be found in the legislation authorizing civil officers to arrest deserters. After this Court had held in *Kurtz* v. *Moffitt*, 115 U. S. 487, that civil officers—in that case, two San Francisco policemen—had no power as such to arrest deserters, Congress authorized "any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government." Section 2 of the Act of October 1, 1890, c. 1259, 26 Stat. 648.[2] Such authority in virtually identical language is presently contained in the 106th Article of War, 10 U. S. C. 1578.[3] To say that this authorizes the arrest of a deserter for purposes of turning him over to the military authorities only after the deserter has been duly convicted by the military authorities is to place the cart before the horse with a vengeance and to make the statute a nullity. Yet that is in substance petitioner's argument here as to Section 42 of the Criminal Code.

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[2] See also Section 3 of the Act of June 16, 1890, c. 426, 26 Stat. 157, 158, containing a similar authorization.

[3] There are added, after "District", the words "possession of the United States."

To require a prior military adjudication that the soldier was a deserter would bring great uncertainty to civil administration of this statute designed to discourage the civilian population from aiding or harboring deserters from the armed forces. For many reasons, the military adjudication might be interminably delayed or even made impossible, as, for example, by the inability of the military authorities to apprehend the deserter, or by his death. Such delays might, in many cases, bar civil prosecution, because the statute of limitations had run,[4] or might make prosecution difficult, if not impossible, because the evidence had become stale or beyond the reach of the prosecuting authorities. It is apparent, therefore, that not only is there no reason in law or policy to read into the statute any such condition as urged by petitioner, but that efficient enforcement of the policy of the statute requires that it be unhampered by such a condition.

2. Petitioner argues that because the statute here involved is related to a military offense—desertion—and because, under our system, military and civil law are kept distinct, it is not within the competence of a civil court to determine whether the military offense of desertion has in fact been committed (Pet. 10–11). But this argument, as petitioner's citations show (*Ex*

[4] There is no military statute of limitations on desertion in time of war. AW 39, 10 U. S. C. 1510.

parte Quirin, 317 U. S. 1; *In re Yamashita,* Nos. 61 Misc. and 672, Oct. Term, 1945; *Duncan* v. *Kahanamoku,* Nos. 14 and 15, Oct Term 1945; *Kurtz* v. *Moffitt, supra*), confuses the line between civil and military jurisdiction as to persons with the power of civil courts to make incidental determinations of military questions. The civil courts frequently litigate issues of a purely military character, including determinations as to whether military offenses have been committed, either in violation of statutory codes (*e. g., Carter* v. *McClaughry,* 183 U. S. 365; *McRae* v. *Henkes,* 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624; *In re Cadwallader,* 127 Fed. 881 (C. C. E. D. Mo.); *Hanson* v. *South Scituate,* 115 Mass. 336) or in violation of the unwritten laws of war (*Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* Nos. 61 Misc, and 672, Oct. Term, 1945).

There is no mystery about desertion, even though it lacks statutory definition. *Cf.* AW 58, 10 U. S. C. 1530. "A deserter is one who absents himself from his * * * military station or duty, and from the service, without authority, and with the intention of not returning." 2 Winthrop, *Military Law and Precedents* (2d ed. 1896) * 985; see also *Manual for Courts-Martial* (1928) 142;[5] 15 Op. Att'y Gen. 158; *Hanson* v. *South Scituate,*

[5] The 28th Article of War, 10 U. S. C. 1499, which makes absence without leave "with the intent to avoid hazardous duty or to shirk important service" likewise desertion, is not here involved.

115 Mass. 336, 338. Here White had overstayed his time; he started back for his home station in October 1943 but instead went to work for petitioner (R. 12) until he was apprehended four months later (R. 15); and he had no intention of returning to the Army (R. 15, 114, 117). Even in the absence of his own explicit admissions of intention, the circumstance that he wore civilian clothes (*e. g.*, R. 13, 19, 23, 31, 39, 40, 125) would be almost conclusive of his intent not to return to the service. *Manual for Courts-Martial* (1928) 144. Indeed, in close cases the fact that the accused when apprehended was still in uniform is strong evidence of intent not to desert. Dig. Op. JAG 1912–1940, par. 416 (8), subpars. (1), (2), (4); par. 416 (9), subpars. (3), (8), (9), (10).

3. The problem of proving the prior military conviction of the deserter which petitioner says must precede his own civil conviction presents an additional reason demonstrating the unsoundness of his contention. The military conviction cannot be proved simply by introducing into evidence the court-martial order reciting the fact and result of the trial; to do this would violate petitioner's right of confrontation under the Sixth Amendment. *Kirby* v. *United States,* 174 U. S. 47. In that case, Kirby was charged with receiving postage stamps which had been stolen, under a statute which provided that the judgment that the principal felon has been convicted shall be conclusive evidence in the prosecution against the receiver that the property has been stolen.

Such judgment was duly introduced, and Kirby was convicted. This Court reversed the conviction, holding the statutory provision unconstitutional in the face of the Sixth Amendment; it pointed out that proof that the stamps had been stolen must be supplied by witnesses, the same as any other element of the crime. Under that decision, the proof of White's desertion offered in the instant case was clearly the only competent evidence of such desertion which could be received. Petitioner in effect asks that his own trial be postponed in order to await the inadmissible testimony of White's military conviction.

4. The same result follows under generally accepted rules of criminal law regarding parties to crime. If the offense for which petitioner was tried is construed as being in effect that of an accessory after the fact, it is unnecessary as a condition thereof that the principal offender, the deserter, be convicted or even arrested. Compare, *e. g., Kaufman* v. *United States,* 212 Fed. 613 (C. C. A. 2); *Neal* v. *United States,* 102 F. 2d 643 (C. C. A. 8); *United States* v. *Venturini,* 1 F. Supp. 213 (S. D. Ala.); *Chapman* v. *United States,* 3 F. Supp. 903 (S. D. Ala); *State* v. *Jones,* 91 Ark. 5. But—and more properly—considering the act denounced by Section 42 as a distinct offense, the circumstance that petitioner's guilt is contingent upon proof that another crime has been committed does not require that someone else must have been convicted for that other crime. The most apt analogy is the crime of receiving

stolen property. To establish that offense it must, of course, be shown that the property charged to have been received was in fact stolen. But the guilt of the receiver is as a principal in an independent crime and is not derivative or dependent on the guilt of the thief. 1 Bishop, *Criminal Law* (9th ed.) § 700; cf. 2 Wharton, *Criminal Law* (12th ed.) § 1229. Similarly, under federal criminal statutes such as the National Motor Vehicle Theft Act (18 U. S. C. 408) and the National Stolen Property Act (18 U. S. C. 415), offenders have been tried and convicted in countless cases without regard, and properly so, to whether the thief has been apprehended or tried for his independent offense. Cf. *Kirby* v. *United States, supra.*

5. Finally, petitioner urges (Pet. 4):

> The result of such construction requires a member of the military services to be adjudicated guilty of the crime of desertion by a civilian tribunal without anticipatory punishment. It may occasion any civilian seeking to aid a returned soldier to commit a crime of which he was unaware. It conceivably could be applied to any member of the family of a member of the armed forces who without intent, urged and condoned his failure to return to camp on time. Likewise, does it possibly preclude the long recognized distinction between the crimes of Absent Without Leave as contrasted to desertion.

It is a sufficient answer that the statute expressly requires that to establish the offense it must be shown that the person charged with aiding or harboring knows the soldier to be a deserter, and that the evidence in this case unequivocally established petitioner's knowledge that White was a deserter and petitioner's efforts to prevent White's apprehension as such (pp. 3–4, *supra*). Indeed, as White testified, petitioner threatened "to turn me in to the Sheriff in Pontiac, for being a deserter from the Army" (R. 14). And, with White's intent to desert established by his own testimony and admissions (R. 15, 114, 117), there could be no possible danger of confusing absence without leave and desertion.

CONCLUSION

The decision below is clearly correct; there is no conflict; and the question is not one which requires further review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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United States of America
In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 230

EDWIN CHARLES BEAUCHAMP,
Petitioner and Appellant,
vs.
THE UNITED STATES OF AMERICA,
Respondent and Appellee

PETITION FOR REHEARING

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SUBJECT INDEX

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PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner Edwin Charles Beauchamp respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 14th day of October, 1946, denying his petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Counsel for petitioner, firmly believing in the merits of his cause, upon reflection, is convinced that his own ineptitude of expression and form provides proper ground for this court's action thereon. Rule 38(2), Supreme Court Rules. For this reason only is the present petition filed. For this reason solely do we seek this court's consideration, of the following as a proper presentation for the relief sought.

SUMMARY STATEMENT OF THE MATTER INVOLVED

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

A single count indictment charged Edwin Charles Beauchamp, petitioner herein with violation of Title 18, U. S. C. A. 94. Specifically, it accused petitioner, of aiding and assisting one who had deserted from the United States Army. It named Alexander White (Beauchamp's former employee at the Hub Auto Parts, in Pontiac, Michigan) as the deserter; and asserted that petitioner's assistance was rendered with knowledge that the said White had deserted (1-2).

Trial without jury was had (3). Thirteen witnesses, including the soldier Alexander White testified in behalf of the government. From none of them, nor from any exhibits introduced, did it appear that the soldier, Alexander White, had ever been accused, tried, or convicted by a military tribunal, of violating any provision of the Articles of War relating to the crime of desertion.

On the contrary it did appear that Alexander White had been inducted into the United States Army on July 9th, 1942 (10). In August of 1943, he returned to the vicinity of Pontiac on furlough (10, 16, 29). He stayed at the home of a friend, Bill Marotz, who was then employed by the

petitioner. Before the expiration of his furlough, this petitioner saw him; knew he became ill; knew he was taken to the United States military hospital at Selfridge Field, Michigan.

The next time the petitioner saw him was in November of 1943, when White appeard in civilian clothes; sought and obtained his old job back on the claim he had received a medical discharge from the army.

In February of 1944, Alexander White was arrested by Pontiac police officers at the telephoned request of Military Police in Detroit (105). It appears that a circular for the apprehension of stragglers or those failing to report to a United States Army camp had issued for White in September, 1943 (104).

Petitioner testified in his own behalf. He asserted good faith in his rehiring of Alexander White in November of 1943; as a soldier who had received a medical discharge from the army (91, 93, 98). He was supported by nine other witnesses, including Stanley White, brother of Alexander White, as well as the soldier Alexander recalled as a witness by trial counsel.

Motions made at the conclusion of the government's case (65) and again at the termination of all the testimony (130-133) sought to note the distinction between the military crimes of desertion and being A. W. O. L.

Petitioner was adjudicated guilty by the court (4) and sentenced to serve a period of twenty (20) months imprisonment; and to pay a committed fine in the amount of One Thousand ($1,000.00) Dollars (4).

Thereafter, appeal was taken to the United States Circuit Court of Appeals for the Sixth Judicial Circuit (5-6). Oral argument was presented and the cause submitted on December 11, 1945 (145).

In an opinion (146-151) written by the Honorable District Judge Miller, then sitting by designation, the court below ruled adversely to petitioner's contentions. This was filed April 1, 1946 (146). The judgment affirming the District Court was likewise entered the same day (145).

A petition seeking rehearing was filed April 22, 1946 (153) and denied May 27, 1946 (165).

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question pursuant to section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28 U. S. C. A. 347). Also see Rule 37(b)(1) of Federal Rules of Criminal Procedure, effective September 1, 1945.

The statute of the United States here involved is that portion of Section 42 of Criminal Code (18 U. S. C. A. 94), following the semi-colon. The entire statute reads as follows:

> "Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than $2,000."

The judgment appealed from was entered on April 1, 1946 (145). Petition for rehearing was duly filed in the United States Circuit Court of Appeals for the Sixth Circuit on April 22, 1946 (153) and an order overruling the same filed on May 27, 1946 (165).

This is a criminal case in which the opinion of the Circuit Court of Appeals for the Sixth Circuit (146-151), in support of the judgment affirming conviction of petitioner herein by trial without a jury (145) involves a question of gravity and importance. The cases believed to sustain the jurisdiction are:

Brooklyn Savings Bank v. O'Neil, 65 Supreme Court 895, 324 U. S. 697;

Bollenbach v. U. S., 90 Law Edition 318, 326 U. S. 607;

Screws v. U. S., 89 Law Edition 1495, 325 U. S. 91.

THE QUESTION PRESENTED

Did the Circuit Court of Appeals for the Sixth Judicial Circuit, err in overruling petitioner's contention that until there had been an adjudication by the proper military tribunal, that the soldier involved was guilty of violating the Articles of War relating to desertion, the District Court was without jurisdiction to try the issue presented by the indictment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I.

The Court below in its decision decided an important question of Federal law which has not been but should be settled by this Court.

This is evidenced by the approval of the procedure in *Firpo v. United States,* 261 Fed. 850 (149). In that case, decided by the Circuit Court of Appeals for the 2nd Circuit, there was in effect submitted as a proper jury question; whether or not the soldier involved was actually a deserter from the United States Army, in order to then determine guilt or innocence of the accused civilian. The opinion of the court below condoned this practice upon the part of the trial judge and by its consideration of the evidence did more; they held that the soldier here involved was a deserter from the army, and that petitioner had knowledge thereof (149-151).

This, in effect, results in the inescapable conclusion that concurrent jurisdiction exists in the District Courts and the Military Courts to determine guilt of the military crime of desertion.

Citation of authorities in support of the law relating to accessories (148), and application of constitutional safeguards to a civilian accused of crime (147) but ignore this fundamental error.

It is agreed (148), that a person in the military service who violates the Articles of War is only triable by the military courts; with equal unanimity must it be recognized that the practice and procedure of those courts is exclusively provided for by these Articles (10 U. S. C. A. 1471 etc.); such trials are not subject the constitutional or evi-

dentiary safeguards afforded civilians accused of crime, *Dynes v. Hoover*, 20 How. 65, *Ex Parte Quiren*, 317 U. S. 1; but do permit a finding of guilt of a lesser offense than the most serious charged, *Articles of War Annotated (Tillotson)*, (2nd), Rev. Ed. 1943, p. 124; to permit the opinion of the lower court to stand is in effect not only to repudiate the foregoing aphorisms but to add thereto a corollary; viz., except where a civilian is accused of aiding a soldier who the jury may believe should be found guilty of desertion. Clearly then this presents a case in which this court should exercise its discretionary powers to decide the extent to which such practice may be carried.

II.

The Circuit Court of Appeals decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Upon but one previous occasion did this Court have cause to take cognizance of this act. *Kurtz v. Moffitt*, 115 U. S. 487. The situation there presented did not necessitate final determination of the exact question here raised.

It there appeared that police officers of the City of San Francisco arrested Kurtz, a soldier of the United States Army as a deserter; held him in custody for the purpose of delivery to the United States military authorities—to be tried according to the laws of the United States.

A Petition for Writ of Habeas Corpus was filed by Kurtz in the local court. It was removed to the United States Court and by it remanded. Upon final hearing the California Court denied the Petition and returned Kurtz to custody.

After first affirming the Order remanding the cause to the State Court, Mr. Justice Gray, delivering the Opinion of this Court, logically reversed the State Court's final

determination thereof, on the basis that a civilian does not have any right to arrest and detain a member of the United States military service, except upon express authority of the proper military officers.

The distinction between civilian and military offenses comes to us as part of our heritage from the English Common Law. It was incorporated as a part of the Bill of Rights of the American Constitution. Distinctions as to procedure, trial and punishment were equally recognized by our progenitors in their earliest legislative enactments. Such was the supporting argument of Mr. Justice Gray in that case (pp. 498-504).

At page 502 did he have occasion to note that section of the Penal Code with which we are here concerned by stating, (it)

> "* * * merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion of a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself, and no tendency to show that he may be arrested by a private citizen without authority from a mililtary officer. Indeed, the last clause above quoted has rather the opposite tendency."

This language relates properly, to that portion of the statute we are here discussing, preceding the semicolon. It cannot, nor can the learned Justice have contemplated its applicability to the latter portion thereof, viz., to a civilian who aids a soldier, knowing that he had deserted. Plain reading of the entire context supports this conclusion. Greater vehemence is added by Mr. Justice Gray's reference to such civilians "* * * accessories to the crime of desertion by a soldier * * *."

With this thought in mind does petitioner urge that under a situation as is here presented, *Kurtz v. Moffitt (supra)* may properly be cited as dicta for his position.

This is supported by recognition of certain fundamental precepts: notably (a) desertion from our armed forces is comparable to treason; (b) a civilian who knowingly aids such a traitor cannot be tried by the military tribunal; (c) in the absence of such a penal statute, such a civilian could not be tried at all; (d) our enemies may reside within our national boundaries; (e) give this venomous aid, again and again without fear of any prosecution or punishment whatsoever; hence Congress enacted this measure to insure prosecution and punishment of the civilian who might entice a soldier to desert; or should he meet one who had deserted; lend aid and succor to him.

Wherefore, it is respectfully requested that the order denying certiorari, heretofore entered, be vacated; and that upon consideration of the instant petition a Writ of Certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Sixth Circuit as provided for by the Statutes of the United States and the Rules of this Honorable Court.

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Attorney for Petitioner.

DONALD B. FREDERICK,
Of Counsel.

CERTIFICATE OF COUNSEL

I, Henry S. Sweeny, attorney for the above named, Edward Charles Beauchamp, petitioner herein, by Donald B. Frederick, of counsel, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

.....
Henry S. Sweeny
Attorney for Petitioner.

By.....
Donald B. Frederick
Of Counsel.